IN THE

Supreme Court of the United States

October Term, 1963

No. 449

A Quantity of Copies of Books, HAROLD THOMPSON and ROBERT THOMPSON, dba, P-K NEWS SERVICE,

Appellants,

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court of the State of Kansas.

BRIEF FOR THE APPELLANTS.

STANLEY FLEISHMAN,
1680 North Vine Street,
Los Angeles 28, California,
Counsel for Appellants.

Of Counsel:
SAM ROSENWEIN,
C. L. HOOVER,
ROBERT A. SCHERMERHORN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Opinions Below.

The opinion of the Supreme Court of the State of Kansas [R. 37-41] was divided, Justice Price and Justice Robb dissenting without opinion [R. 41]. The opinion is reported in 191 Kan. 13, 379 P. 2d 254. The memorandum decision of the District Judge [R. 16-18] is unreported, but appears in its entirety in the aforesaid opinion of the Supreme Court of the State of Kansas [R. 38-40].

Jurisdiction.

This was an *in rem* proceeding [R. 35-36], instituted under the laws of Kansas (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30) seeking the public destruction "by burning or otherwise" [R. 36] of certain specified books [R. 35] alleged to "contain obscene, lewd and lascivious language" [R. 36] and alleged to be, in their entirety, "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 36].

The judgment of the Supreme Court of the State of Kansas [R. 41] was entered on March 2, 1963 [R. 37], and a due and timely motion for rehearing [R. 42-43] was denied on April 15, 1963 [R. 44]. Notice of appeal to this Court was due and timely filed in the Supreme Court of the State of Kansas on July 9, 1963 [R. 44-49]. The case was docketed in this Court on September 6, 1963. Probable jurisdiction was noted on November 18, 1963 [R. 50].

This Court's jurisdiction to review the judgment is conferred by 28 U. S. C. 1257(2). The judgment upheld the state statute against claims that on its face and as applied, the statute violated the Federal Constitution. The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case: *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Marcus v. Search Warrant*, 367 U. S. 717; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of the General Statutes of Kansas (G. S. 1961 Supp. 21-1102, 21-1102c, L. 1961, ch. 186, Sections 1, 4, June 30) are attached hereto as Appendix.

Questions Presented.

1. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied, by reason of the absence of a provision for a jury trial of the essential issues thereunder, and by reason of a denial of a jury trial in the cause herein despite appellants' requests duly made, renders the statute unconstitutional because the statute, on its face and as so construed and applied, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of their liberty and property without due process of law, and discriminatorily denies appellants the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied to authorize the search and seizure of the books herein involved, constitutes a prior restraint on the circulation of books including the books involved herein, thereby abridging the exercise of free-

doms of speech and press including appellants' exercise thereof, all protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, deprives appellants of the right to be secure against unreasonable searches and seizures protected by the provisions of the Fourth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved by applying solely the contemporary standards of the community of Junction City, Kansas, in judging the alleged obscenity of the books, abridges appellants' exercise of freedoms of speech and press protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the statute (G. S. Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the

average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, and discriminatorily deprives appellants of the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

6. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize destruction of the books herein upon the ground that the books are obscene and violate the statute, abridges the exercise of freedoms of speech and press including appellants' exercise thereof, protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied, by failing to provide any ascertainable standards under which men of common intelligence can know what is or is not permissible; by failing to contain any requirement of scienter; by failing to provide for a jury trial, and the denial of a jury trial duly requested by appellants; by authorizing a prior restraint on the circulation of books, including the books herein; by authorizing the search and seizure of books, including the books herein; by authorizing the search, seizure and destruction of the books herein involved, applying solely the contemporary standards of Junction City, Kansas, without any evidence that the

books substantially exceed limits of candor in the description or representation of sex or nudity or appeal to the prurient interest of the average person, the uncontradicted record in fact showing that the books do not; and by ordering the destruction of the books as allegedly obscene in violation of the statute, all operates and operated to deprive appellants of freedoms of speech and press, arbitrarily to deprive appellants of liberty and property without due process of law, and discriminatorily to deny appellants the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment, the search and seizure provisions of the Fourth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Statement of the Case.

(a) On July 25, 1961, an information, verified by William M. Ferguson, Attorney General of the State of Kansas, was filed in the District Court of Geary County, Kansas [R. 35-36]. The caption of the information was entitled in the name of the State, as plaintiff, against a quantity of books, the specific titles of each of the books, fifty-nine in number, being set forth in the caption, together with the statement that each of the specified books had been published as "This is an original Nightstand Book" [R. 35]. The information alleged that P-K News Service, located at 340 East 9th Street, Junction City, Kansas, possessed, or kept for sale and distribution on July 24, 1961, a quantity of paper-back books, "more particularly described by title in the caption hereof" [R. 36], which books allegedly contained "obscene, lewd and lascivious" language and which books were in their entirety alleg-

edly "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 36], all as allegedly prohibited by the specified laws of Kansas.

The prayer of the information was that a warrant issue to the Sheriff of Geary County, Kansas, directing that the books be brought before the Court and that, after notice to the owner or other person in possession and control of said books of a hearing, and after such hearing, that the Court order the books publicly destroyed, by burning or otherwise [R. 36].[1]

The information aforesaid having been executed by the Attorney General, an Assistant Attorney General was sent with the information for filing in Junction City, Kansas [R. 19]. On July 25, 1961, the information was filed in the District Court of Geary County, Kansas at about 5:00 P.M. [R. 19]. The Assistant Attorney General, accompanied by the County Attorney, then proceeded to the home of the Honorable Albert B. Fletcher, a Judge of the said Geary District Court, informed him of the information, and left seven books with him [R. 19].

At about 8:00 P.M. [R. 19] or 8:30 P.M. [R. 3], Judge Fletcher, the Assistant Attorney General and County Attorney met at the Court House [R. 19]. The Court's attention was called to certain pencilled references to certain sections in the seven books [R. 19].

[1]The information was verified by the Attorney General "upon his information and belief." This verification is omitted from the printed record [R. 36] but appears in "Appellants" Supplemental Abstract and Brief" at page 3, on file in this Court. The parties have stipulated that they may refer in their briefs and arguments to any unprinted portions of the certified record that they may deem appropriate or necessary.

Two of the seven books had pencilled notations and some had slips of paper in them with pencilled notations of page numbers on them [R. 20]. The Judge perused one or more of the books for a short period [R. 19]. The hearing lasted about 40 to 45 minutes [R. 19].

Judge Fletcher stated, on the said July 25, 1961, that he had "scrutinized seven volumes" [R. 3]—six listed in the information, while one was not—and concluded as follows:

> "The same appears to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: 'This is an original Night Stand Book' would fall within the same category and would be contrary to said chapter of the Session Laws." [R. 3].

Based upon "the Information" and "The Court's scrutiny" [R. 4] of the said seven books, Judge Fletcher held that a search warrant should issue forthwith, and the Court set the matter for hearing for "the 7th day of August, 1961" [R. 4].

Thereupon, on the said July 25, 1961, a search warrant issued [R. 4-5]. The warrant recites that it appears from the Information that "quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof" [R. 4] are possessed for sale and distribution at the specified address, and the command of the warrant is "forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock

A.M. on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be made of such books" [R. 4]. The command was further to search the premises and buildings for such books as aforestated [R. 4-5], and to leave a copy of the warrant and notice with the owner of the books, or with any agent on the premises, notifying the owner of the hearing date on August 7, 1961, at which time the owner might show cause why the books seized should not be destroyed by burning or otherwise [R. 5].

Accordingly, on the next day, July 26, 1961, the search warrant was executed by searching the premises and seizing 1,715 books, being copies of 31 different titles [R. 5-6]. The return of the officer who executed the warrant recites: "The following is a list of the Titles and number of books having been published as 'This is an Original Nightstand Book,' seized and in my custody" [R. 5], followed by a list of the books, containing the Publisher's number, the title of each book, and the quantity seized [R. 5-6].

(b) On August 7, 1961, appellants filed their motion to quash the search warrant and Information [R. 7-9]. The grounds of the motion were that the statute on its face and as construed and applied to the books involved were in violation of the state and Federal constitutions [R. 7]; that the statute, on its face and as construed and applied, deprived appellants of their property without due process of law, denied them the equal protection of the laws and freedoms of speech and press, "all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the

Constitution of the State of Kansas" [R. 7]; that the books are not obscene, immoral, lewd or lascivious, nor contain such language, and are entitled to constitutional protection under the "1st and 14th Amendments to the Constitution of The United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas" [R. 7].

It was further urged in the motion to quash that the statute failed to provide ascertainable standards, and that the breadth of the statutory language encompassed constitutionally protected books, and the statute therefore, on its face and as construed and applied, abridged freedoms of speech and press, deprived appellants of their property without due process of law and denied them the equal protection of the laws, all in violation of "the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 8].

The motion also asserted that the statute permitted the seizure of books without prior notice to the owner and without hearing or determination that the seized books are obscene; that the procedures employed to seize the books herein involved operate "as a prior restraint on the circulation and dissemination of books" [R. 9]; that the statute does not provide a limitation upon the time within which a judicial decision must be made on the issue of obscenity, thereby arbitrarily depriving appellants of property without due process of law, denying them equal protection of the laws and freedom of speech and press, "all contrary to the 14th Amendment to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the State of Kansas" [R. 9].

Finally, the motion to quash asserted that the statute on its face and as construed and applied to the books involved authorizing and requiring the seizure of the books is arbitrary and unreasonable and deprives appellants of their right to be secure against unreasonable searches and seizures "secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9].

Following the filing of the said motion to quash on August 7, 1961, and on the same day, a hearing was held where appellants introduced evidence with respect to the manner in which the Information was executed and filed on July 25, 1961; the nature of the proceedings before Judge Fletcher in the evening; and identified the seven books which the Court had scrutinized prior to the issuance of the search warrant, all as aforestated [R. 19-21]. Following oral argument, the Court took the matter under advisement [R. 21].

On August 11, 1961, the Court ruled on the motion to quash [R. 21-24]. The District Court stated at the outset that the motion "goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas" [R. 21]. The Court held that the statute on its face did not deprive appellants of due process of law nor act as a prior restraint on the dissemination of publications [R. 21-23].

The Court stated that due process was not violated by the procedures used to seize the books; that there

was basis for the exercise of judicial discretion prior to the issuance of the search warrant when the Court "read six—I beg your pardon—scrutinized six volumes, all bearing the same notation 'Nightstand Publications'" [R. 24], and the District Court concluded "that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same, and the Court rules that the motion to quash the Information and the Search Warrant shall be overruled" [R. 24].

(c) Prior to the ruling of the Court on the motion to quash on August 8, 1961, appellants moved the Court for a continuance of the hearing on the merits in order to have a reasonable time to prepare their defense [R. 9-10], and thereupon the matter was continued for hearing on the merits to September 14, 1961 [R. 15].

On September 6, 1961, appellants filed a motion for jury trial [R. 10]. The appellants alleged that the the standards for judging obscenity could only be applied by a jury, that "only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 10].

On September 11, 1961, argument on appellants' motion for a jury trial was held, and the motion was on the said day overruled [R. 15]. Appellants renewed their motion to quash, and the said motion was also overruled [R. 15].

On September 14, 1961, the matter came on for trial [R. 15-16] before the said Honorable Albert B. Fletcher, a Judge of the District Court for Geary County, Kansas. The State offered into evidence [R. 25] as Plaintiff's Exhibits 1 through 31, the books in question [R. 5-6]. Appellants objected to the introduction of the evidence on the constitutional grounds urged in support of their motion to quash [R. 7-9; Tr. B-8-9].[2] The objection was overruled [R. 25]. The State rested [R. 25].

Appellants demurred to the evidence, asserting that the State had failed to prove that the books exceeded "contemporary community standards" [R. 25; Tr. B-9-10, 11-16, 21-32]. The State urged that it was not possible to produce an "average man" from the "community of Junction City" [Tr. B-17] or elsewhere, or to obtain a sufficient number of witnesses in order for the Court to determine "what a community standard in the community is" [Tr. B-17]. The State averred that "the Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County" [Tr. B-18]. The State urged that the issue of community standards "is a matter of law" [Tr. B-18]. The State contended that the Court was required to "make a legal decision; in other words, to apply to

[2]The reference "Tr." is to the Reporter's Transcript of proceedings in the District Court (2 volumes), certified by the Clerk of the court below, and on file in this Court. The transcript of proceedings of August 7, 8 and 11, 1961, in one volume, is referred to as "Tr.A"; the transcript of proceedings of September 11, 14, and 15, 1961, in the second volume, is referred to as "Tr.B."

these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21].

Appellants' demurrer to the evidence was overruled [R. 25].

The appellants called witnesses on their own behalf.[3] Qualified experts testified relative to the limits of candor in the community with respect to the description and representation of sex and nudity in books and other writings. Appellants offered into evidence a number of books, some twenty-nine in number, the property of the George Smith Public Library in Junction City, Kansas, and one book (*Tropic of Cancer*) which the librarian testified she wanted to purchase but which was too expensive, and another book, a copy of which belonged to the library but was lost.[4]

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[3]Lois York [R. 25-28], Librarian of the George Smith Public Library in Junction City, Kansas; Edward A. Howard [R. 28-30], Librarian at the Lawrence Public Library, in Lawrence, Kansas; Dr. Richard Lichtman [R. 30-32], Assistant Professor of Philosophy at the University of Kansas City; Joseph Rubinstein [R. 32-34], Assistant Professor of Bibliography and Librarian at the University of Kansas.

[4]Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 26]; *Memoirs of Hecate County* [Deft. Ex. 2, R. 26]; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 26]; O'Hara, *From the Terrace* [Deft. Ex. 5, R. 26]; *Peyton Place* [Deft. Ex. 6, R. 26]; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 26]; Joyce, *Ulysses* [Deft. Ex. 8, R. 26]; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 26]; Wolfe, *The Magic of Their Singing* [Deft. Ex. 10, R. 26]; O'Hara, *A Rage to Live* [Deft. Ex. 11, R. 26]; Mergendahl, *The Bramble Bush* [Deft. Ex. 12, R. 26]; Borth, *The Sot Weed Factor* [Deft. Ex. 13, R. 26]; Anderson, *Winesberg, Ohio* [Deft. Ex. 14, R. 27]; Caldwell, *God's Little Acre* [Deft. Ex. 15, R. 27]; Jackson, *The Fall of Valor* [Deft. Ex. 16, R. 27]; Caldwell, *Tobacco Road* [Deft. Ex. 17, R. 27];

The testimony of the witnesses established that many of the books introduced into evidence by appellants, books which generally could be found in the public library and on best-seller lists, were more candid in description and representation of sex, and in the explicit use of language, than the books involved in the case. The testimony of the witnesses was that the books offered into evidence by the State contained integrated plots and characters and did not exceed limits of candor or customary freedom of expression in the description or representation of sex [R. 25-28, 28-30, 30-34].

Following the presentation of the aforesaid testimony, appellants rested [Tr. B-136]. The State offered no rebuttal [Tr. B-136].

The District Court rendered a memorandum decision [16-18] on September 19, 1961. The District Court construed the *Roth* test for obscenity as containing four essential ingredients: "average person"; "contemporary

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Steinbeck, *Grapes of Wrath* [Deft. Ex. 18, R. 27]; Nabakov, *Lolita* [Deft. Ex. 19, R. 27]; Pennell, *History of Rome Hanks* [Deft. Ex. 20, R. 27]; Voltaire, *Candide* [Deft. Ex. 21, R. 27]; Huxley, *Brave New World* [Deft. Ex. 22, R. 27]; Zola, *Nana* [Deft. Ex. 23, R. 27]; Defoe, *Roxana, the Fortunate Mistress* [Deft. Ex. 24, R. 27]; *The Satires of Juvenal* [Deft. Ex. 25, R. 27]; *The Satyricon of Petronius* [Deft. Ex. 26, R. 27]; Farrell, *The Young Manhood of Studs Lonigan* [Deft. Ex. 28, R. 27]; Mykle, *The Song of The Red Ruby* [Deft. Ex. 29, R. 27]; Miller, *Tropic of Cancer* [Deft. Ex. 38, R. 27, Tr. B-117]; Mason, *The World of Suzie Wong* [Deft. Ex. 27, R. 28]. Following the direct testimony of the witness York, counsel for appellants requested permission to withdraw the books which in all but two instances belonged to the public library, and to substitute duplicate copies as quickly as possible. There was no objection [Tr. B-53]. Together with the certified record and the Reporter's Transcripts of the proceedings, the Clerk of the court below has certified the State's Exhibits 1-31, and Defendants' Exhibits 1, 2, 4, 5, 6, 7, 9, 11, 19, 29, 38, now on file in this Court.

community standards," "dominant theme" and "prurient interests" [R. 16], the first two ingredients described by the Court to be "impossible as to ascertainment to a certainty" [R. 17].

The District Court stated that the Court would draw a line between the books in question and the comparable books introduced by appellants—that line being "the purpose for which the books were written" [R. 17]. According to the District Court, the "core" of the books in question "would seem to be that of sex, with the plot, if any, being subservient thereto"; the "core" of the books introduced into evidence by appellants "would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion" [R. 17].

The District Court stated that the Court had made the *Roth* test operative in the case herein in the following manner: "If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection" [R. 17-18].

A motion for new trial was overruled [R. 18]. The order, judgment and decree of the District Court directing the books to be turned over to the Sheriff of Geary

County to be destroyed by said Sheriff "upon the further order of this Court" [R. 18] was entered on January 19, 1962 [R. 14]. Execution of the said order of destruction has been stayed by order of the District Court pending final determination of the appeal herein.

(d) On appeal to the Supreme Court of the State of Kansas, appellants renewed all their constitutional claims, contending that the statute, on its face, and as construed and applied, abridged freedoms of speech and press; deprived appellants of their liberty and property without due process of law; denied the equal protection of the laws; deprived appellants of their right to a jury trial; deprived appellants of their right to be secure from unreasonable search and seizure; that there was a failure of proof of the essential ingredients of the offense; that only the local standards of the community had been applied; that the books ordered destroyed were constitutionally protected;—all in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court of the State of Kansas affirmed the judgment of the District Court, Justices Price and Robb dissenting without opinion [R. 37-41]. The opinion of the Supreme Court sets forth the memorandum decision of Judge Fletcher, in full [R. 38-40]. The Supreme Court took note of the fact that appellants "are asserting all of the matters urged to the trial court" [R. 40].

The majority opinion recites the search and seizure procedures, utilized in the case under the state statute,

as heretofore detailed [R. 37-38]. After then setting forth the memorandum decision of the District Court, the opinion states that the test for obscenity provided in the statute (G. S. 1961 Supp. 21-1102a) is "adequate" and is being applied by the Court [R. 40].

The majority opinion states that the "vital question" is whether the seized books were in fact obscene [R. 40]; that the test for obscenity is not easy to state; that Irvin S. Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 40].

As to the argument that no evidence was adduced by the prosecution to show comparison of the seized books with other books in common circulation, the opinion of the Court merely states that the District Court pointed out the difference between the seized books and the twenty-nine books taken from the Junction City Public Library [R. 40].

The majority opinion states that the brief submitted by the Attorney General listed the 31 seized books, "the pages upon which the obscenities occur," and a "short description" [R. 40]. The opinion states: "We have checked the cited pages and find that they well bear out the descriptions" [R. 40]. The Court then immediately added that the books as a whole come within the definition "found in paragraph 4 of the syllabus in Roth v. United States" [R. 40].

The Supreme Court stated that the seized books are "hard core pornography"; "obscene by the definition

found in the Roth case", or "by the definition found in the statute", or "by any other definition" [R. 40]; and that young G. I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion", to wit, that the books are hard core pornography [R. 41].

The Court stated that obscenity is not protected by the "First Amendment" nor is it protected by the "due process clause of the Fourteenth Amendment" [R. 41]; that there was "no right to a jury trial" [R. 41] because the action grows out of a statute, and no basis existed for a jury at common law. "Amendment VII of the federal constitution" preserves only the right of trial by jury "as it existed at common law" [R. 41], observed the Court.

The Court concluded that the seized books were without "literary merit", were "trash" [R. 41].

ARGUMENT.

Summary of Argument.

(a) The absence in the Kansas statute herein of a right to jury trial, and the refusal to grant appellants' request for a jury trial and jury determination of the issue of obscenity, renders the statute unconstitutional. This Court adopted the "contemporary community standards" test in *Roth-Alberts* as an essential ingredient of the constitutional standard for judging the obscenity of a writing, and freedom of expression cannot be safeguarded if the community through its representatives is not permitted to determine the extent of community toleration.

The confluence of English and American history bears witness to the essential inter-relationship between trial by jury and freedor of the press. Historically, the struggle for freedom of speech and press in England was linked with the issue of the right of juries to determine whether particular publications should be suppressed. Early American history, exemplified in the Zenger trial and the demands for a Bill of Rights after the adoption of the Constitution, also support the view that a jury trial for restriction on the sales of books is required by the constitutional guaranty of freedom of the press.

The genesis and evolution of the *Roth-Alberts* test for judging obscenity, and the logic of the decision, additionally demonstrate that a jury trial in obscenity proceedings is required under the Constitution. Protection for writings in *Roth-Alberts* was made dependent upon public opinion; and under such circumstances, trial by jury is an indispensable ingredient of the community standards test. A judge neither in law

nor in fact, is a representative of the community. Only a jury can appropriately determine the issue of customary freedom of expression. Nor can the issue here be determined by assimilating common law concepts to the prosecution of books in the United States, where history, tradition and a written constitution dictate a different resolution of the issue.

This issue is discussed here *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the "common conscience" of the community derived through a jury verdict. Moreover, appellate courts, and ultimately this Court, may declare material constitutionally protected despite a jury determination.

(b) The Kansas statute, on its face and as construed, violates the free speech and press, the search and seizure, and due process provisions of the First, Fourth and Fourteenth Amendments. Suppression of books under the state statute is made dependent upon whether or not the writings arouse "sexual desires" or "sexually improper thoughts"; and search for and seizure of such books are authorized by the mere filing of an information upon information and belief, whereupon a judge is required to forthwith issue a search warrant directing seizure, with a hearing to be had not less than ten days after such seizure. There is no provision for any adversary proceeding on the issue of unlawfulness prior to seizure, and there is no limitation on the time within which a decision on the merits must be made. The statute, as construed, is broad, vague and ambiguous, creates a system of prior restraints upon expression, and authorizes search and seizure procedures completely violative of constitutional inhibitions.

Moreover, the statute as applied to the specific books herein, suffers from the same constitutional infirmities. The District Judge, employing the *Hicklin* technique, never read the seven books submitted to him as a whole prior to the issuing of the search warrant, nor did the Court have time to read the said books. Moreover, solely on the basis of the scrutiny of the said seven books, the District Judge concluded that any publication bearing the imprint of the same publisher would violate the statute. The search warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint, although the District Court had never seen nor read most of the books seized by the police officers under the warrant. This was judicial censorship in its most virulent form.

(c) The adoption by the courts below of the geographical area of Junction City, Kansas, as the community by which to determine the claim of constitutional protection for the books herein involved, renders the statute unconstitutional. Only a national standard for judging the obscenity of writings is compatible in the ultimate sense with First Amendment requirements. The Amendment requires proof, first, that the writing goes substantially beyond the standards of the local community. A local community can, of course, permit broader freedom of expression than even the First Amendment protects. If the writing does not go beyond such local standards, then the writing is clearly entitled to protection. If, however, the writing is found to allegedly exceed local community standards, it may nevertheless not be suppressed unless it is also found that the writing exceeds the standards of the

national community. This requirement is dictated by force of the guarantees of the First Amendment subsumed into the due process provisions of the Fourteenth Amendment.

(d) The State failed to prove, and deliberately refrained from offering any evidence to prove, that the books herein exceeded contemporary community standards. This omission of proof creates a serious constitutional infirmity in the law. Moreover, without contradiction, the appellants proved by competent experts and comparable material, that the writings here do not exceed community standards. The District Court, however, ignored such comparable testimony on the basis of impermissible legal standards improvised by the Court. Thus, the books herein have been suppressed without proof that the writings exceed community standards, and by an arbitrary disregard of uncontradicted proof that the books do not exceed such standard.

(e) In the constitutional sense, the books herein are not obscene, and it was violative of the Constitution to order their suppression. The standards employed by the courts below to authorize the burning of the books herein undermine First Amendment freedoms.

Since the Court has coupled this case and the case of *Jacobellis v. Ohio* for argument, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for appellants briefly discusses the need for re-examination of the basis of the decisions of the Court in the "obscenity" area. Upon critical examination and in the light of

the actual workings of the standards enunciated by the Court, it would appear, it is respectfully submitted, that there is need for reconsideration, and that books dealing with sex should have the same rights and be subject to the same limitations which are accredited all other expressions under the Constitution of the United States and the decisions of this Court.

I.

The Absence in the Kansas Statute Herein of a Right to Jury Trial, and the Refusal to Grant Appellants' Request for a Jury Trial and Jury Determination of the Issue of Obscenity, Renders the Statute Unconstitutional on Its Face and as Applied, in Violation of the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

(a) In *Roth v. United States (Alberts v. California)* 354 U. S. 476, 489, this Court promulgated the following standard for judging the obscenity of writings: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." It was stated in the opinion of Mr. Justice Brennan that the aforesaid standard was intended to replace the unconstitutionally restrictive Hicklin test, that "the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity." 354 U. S., at 489.

In *Roth-Alberts*, and in the decisions of this Court which followed *Roth-Alberts*, it was repeatedly affirmed that the standards for judging the obscenity of writings, and the application of such standards in particular cases, must safeguard the protection of freedom of

speech and press for material which is not obscene. *Roth v. United States (Alberts v. California)*, 354 U. S. 476, 488; *Smith v. California*, 361 U. S. 147, 152, 155; *Marcus v. Search Warrant*, 367 U. S. 717, 730-731; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 490-491; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 65-66.

The rationale of the decisions is that the power of a State to suppress "obscenity" is limited by the First Amendment protections for freedom of speech and press. There are constitutional barriers to the practical exercise of the power of suppression. A State plainly cannot restrict the dissemination of books which are not obscene. So too, a State may not impose absolute criminal liability on a bookseller for the possession of alleged obscene material, for such exercise of the power of the State tends to inhibit freedom of expression. Nor may the search and seizure procedures employed by a State to suppress alleged obscene writings be so vagrant as to fail to assure nonobscene material full constitutional protection. A State, in short, "is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U. S. 717, 731. *In Manual Enterprises, Inc. v. Day*, 370 U. S. 478, it was affirmed: "We risk erosion of First Amendment liberties unless we train our vigilance upon the method whereby obscenity is condemned no less than upon the standards whereby it is judged."

In *Bantam*, this Court pointed out that the Fourteenth Amendment requires that regulations of obscenity by the States conform to procedures that will ensure

against the curtailment of constitutionally protected expression, "which is often separated from obscenity only by a dim and uncertain line." 372 U. S. at 66. Insistence upon such vigorous procedural safeguards is "but a special instance of the larger principle that the freedom of expression must be ringed about with adequate bulwarks." *Id.*, at 66.

In *Speiser v. Randall*, 357 U. S. 513, while assuming without deciding that a State may deny tax exemptions to persons who engage in certain proscribed speech for which they might be fined or imprisoned, this Court nevertheless held that procedures which placed the burdens of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the due process provisions of the Fourteenth Amendment. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." 357 U. S. at 520.

Kansas has held that books may be suppressed as obscene—as allegedly going beyond "contemporary community standards"—without a jury trial or jury determination. The question here is whether a State, consistent with the requirements of due process and a free press, can dispense with such a "sensitive tool" in the fact-finding process where the indispensable freedoms of speech and press are involved. The appellants submit that the question must be answered in the negative. "A statute which does not afford the defendant, of right, a jury determination of obscenity, falls short, in

my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Mr. Justice Brennan in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448.[5]

(b) If the adoption by this Court of the "contemporary community standards" test as an essential ingredient of the standard for judging obscenity was intended to protect writings tolerated by the community from arbitrary governmental suppression (see, *Smith v. California*, 361 U. S. 147, 171), then, it is submitted freedom of expression is not thus safeguarded when the community through its representatives is not permitted at the very least to make the determination.[6] "Upon this point a page of history is worth a volume of logic." Mr. Justice Holmes in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349.

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[5]See also, Mr. Justice Douglas' dissent in *Kingsley*, concurred in by Mr. Justice Black, finding the New York statute to transgress constitutional guarantees because, among other things, the statute substituted "punishment by contempt for punishment by jury trial." 354 U.S., at 447. In *Times Film Corporation v. City of Chicago*, 365 U. S. 43, Mr. Chief Justice Warren stated: "The inexistence of a jury to determine contemporary standards is a vital flaw." 365 U.S., at 68-69. Mr. Justice Stewart, while a Judge of the Court of Appeals, stated in *Volanski v. United States*, 246 F. 2d 842 (6th Cir., 1957) that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury." 246 F. 2d, at 845.

[6]The argument which follows on the issue of a jury trial as a matter of constitutional right in obscenity proceedings is not intended to concede that any book in the United States should be at the mercy of a vote of the "common conscience" of the community. "One's right . . . to free speech, a free press . . . may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638. So long, however, as the circulation of books dealing with sex depends upon current community notions of what is acceptable, it is submitted that jury trial and jury determination are integral to such standard.

Historically, the struggle for freedom of speech and press in England was linked, among other things, with the issue of the right of juries to determine whether particular publications should be suppressed. Fox's Libel Act of 1792 while in terms procedural, transferring from the judge to the jury the power of saying whether any specific writing was a seditious libel, in actuality "placed the decision in the hands of twelve men whose views were more likely to be representative of general opinion then would be judges and lawyers who perforce had studied the sweeping assertions of the older law cases—which were often relics of Stuart and Star Chamber days." Taswell-Langmead, *English Constitutional History* (11th ed., 1960) 667.

The trials of Wilkes and the printers of the "North Briton"; the prosecution of Wilkes for his "Essay on Woman", found to be an "obscene and impious libel"; the trial of Junius for his celebrated letter to the King; the trial of Thomas Paine *in absentia*, with his historic defense by Erskine; the trial of John Horne for libelling the King's troops in America by calling them murderers; the trials of the Dean of St. Asaph and of Stockdale for the publication of "seditious" pamphlets—all of these cases were monstrous examples of how liberty of the press can be subverted when the jury is deprived of its power to decide. "Trial by jury was the sole security for freedom of the press; and it was found to have no place in the law of England." 2 May, *Constitutional History of England* (Holland ed., 1912) 11.

The change in the law of England at the close of the eighteenth century, as exemplified by Fox's Libel Act, was made necessary by the insistent demand of the people for the right of juries to render general verdicts

in all libel cases. "It was realized that, if the functions of the jury in a prosecution for libel were enlarged, . . .; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political ideas and the public opinion of the day." X Holdsworth, *History of English Law* (Lond., 1938) 673.

In the debates in the Commons prior to the passage of the Libel Act, it became clear that the real issue was whether the juries or the judges were the best tribunal to decide the question of libel or no libel. Stated one member of the House:

> ". . . . it depends solely on the opinion which is entertained of the libel by the public. . . . What passed in the Roman Senate for polite raillery, would in this House be deemed a gross affront, and be perhaps attended with bloodshed. . . . So changeable is the nature of a libel, so much does it assume the cameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinions. There is no other standard by which it can be measured or ascertained. Who then, so proper as the people to determine the point?"
>
> Quoted in X Holdsworth, *supra*, at 689.

When the Libel Act was passed, Lord Macauley praised "the inestimable law, which places the liberty of the press under the protection of juries." 2 May, *Constitutional History of England* (Holland ed., 1912) 18, fn. 3. Moreover, Thomas Erskine's fame was premised upon his courageous defense in the eighteenth century of "the liberty of the press and the rights of

juries". 2 May, *supra,* at 16. Almost one hundred years later, a noted English lawyer was to say: "Take, for instance the freedom of the press. This, which we justly prize as one of the first of social blessings, is chiefly indebted to the jury for its vigorous existence". Forsyth, *History of Trial by Jury* (2d. ed., 1878) 364.

Early American history also sheds light on the issue here involved. "The close relations between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine, as well as by reference to Zenger in the discussions preceding the First Amendment." Chafee, *Freedom of Speech* (1920), 23. From the viewpoint of the liberal colonists in America in the early 1700's, "freedom of the press involved both absence of previous restraint and the right to a jury trial". I Government and Mass Communications (1947) 71. Professor Chafee was thus led to observe ". . . a jury trial for restrictions on the sale of books is probably required by both sound policy and the constitutional guaranty of freedom of the press." *Free Speech in the United States* (1941) 539. Support for this view comes also from a noted student of American constitutional history. "Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression." Emerson, *The Doctrine of Prior Restraint* in 20 L. and Cont. Prob. 648, 657 (1955).

It should be recalled that many issues of the New York Weekly Journal published by Zenger were first "burnt by the hands of the common hangman" before Zenger was indicted for publishing "false, scandalous,

malicious and seditious" publications. *The Trial of John Peter Zenger (1734) and The Freedom of the Press*, prepared by the Works Projects Administration (1940) iii. See also 17 Howell's State Trials 675 (Lond. 1813). In his argument to the jury, Andrew Hamilton pointed out that one of the reasons for the abolition of the court of Star Chamber was that "the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the Kingdom, without the judgment of a jury of their equals" *id.*, at 47. Hamilton urged that "jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects." *id.*, at 49. And on the occasion when Mr. Hamilton was presented with the Freedom of New York after the acquittal of Zenger, the scroll presented to him by the common-council extolled "his learned and generous defense of the rights of mankind, and the liberty of mankind, and the liberty of the press" *id.*, at 58.

When, in 1789, James Madison rose to address the first House of Representatives, he urged upon the House certain proposed amendments to the Constitution which would "expressly declare the great rights of mankind secured under this Constitution". 1 Annals of Congress (1834) 432. Madison stated that the great mass of the people who opposed the Government created by the Constitution "disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the

sovereign power" (*id.*, at 433). Thus, Madison proposed the following amendment, among others: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" *id.*, at 434.

Madison pointed out that the policy of Great Britain in establishing a declaration of rights was not applicable to America. In England, a barrier had been raised against the power of the Crown, but the power of the Parliament "is left altogether indefinite" *id.*, at 436. Even Magna Charta, Madison observed, contained no provision for the "great rights, the trial by jury, freedom of the press, or liberty of conscience" *id.*, at 436. In the United States, stated Madison, the case was different. Barriers against power "in all forms and departments of Government" had been raised *id.*, at 436.

Madison affirmed "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature" *id.*, at 437. He warned that "the State Governments are as liable to attack these valuable privileges as the General Government is, and therefore ought to be as cautiously guarded against" *id.*, at 441.

Thus, the confluence of English and American history bear witness to the essential inter-relationship between trial by jury and freedom of the press. The First Amendment was intended to prevent not merely the censorship of the press, but "any action of the government by means of which it might prevent such free and general discussion of public matters as seems

absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U. S. 233, 249-250.

(c) There is also, it is submitted, a more particular history which bears importantly on the issue here involved. The genesis and evolution of the *Roth-Alberts* test for judging obscenity, and the logic of this Court's decision in *Roth-Alberts*, support the view that a jury trial and jury determination of obscenity is a matter of constitutional right under the First and Fourteenth Amendments.

The early decisions in the United States adopted the *Hicklin* test devised by Justice Cockburn in 1868. Lockhart and McClure, *Literature, The Law of Obscenity and The Constitution* in 38 Minn. L. Rev. 295, 325-326 (1954). The inconsistency of the *Hicklin* rule with First Amendment principles, however, became soon apparent, and in 1913 Judge Learned Hand inquired whether the word "obscene" should not be allowed, to indicate "the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" *United States v. Kennerley*, 209 Fed. 119, 121 (D. C. N. Y. 1913). In Judge Hand's view, if literature were to be made subject to the "social sense of what is right", then a "jury should in each case establish the standard" (*id.*, at 121). "A jury", stated Judge Hand, "is especially the organ with which to feel the content comprised with such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech" *id.*, at 121.

In *United States v. Levine*, 83 F. 2d 156 (2d Cir., 1936), Judge Hand again stressed the requirement of a jury in obscenity actions. "Thus 'obscenity' is a function of many variables and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care." 83 F. 2d, at 157. Again, during discussion of the Tentative Draft by the American Law Institute, Judge Hand, expressing concern about the "absolute unknown contour" of the obscenity concept, stated that "we must leave it to the jury to say, is this obscene". American Law Institute, *Proceedings*, 34th Annual Meeting, 190-191 (1957).

The drafters of the Model Penal Code issued their recommendations on obscenity shortly before the rendition of the *Roth-Alberts* decision in 1957., A. L. I. Model Penal Code, Tent. Draft No. 6 (May 6, 1957). The definition of obscenity as proposed by the Institute was as follows "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."[7] As to this definition of obscenity, the Institute stated:

> "Under our definition of obscenity a court could not instruct that a given writing is obscene as a matter of law, since elements other than the na-

[7]That the Institute intended to make customary freedom of expression an unique and essential ingredient of the test for obscenity is emphasized by the definition of obscenity as it appears in the final proposed draft, A.L.I. Model Penal Code, Proposed Official Draft (May 14, 1962), section 251.4(1). See *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 485-486.

ture of the material itself enter into the determination, particularly the question of customary freedom of expression. Jury trial in this field has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters."

A. L. I. Model Penal Code, *supra*, at 47.

Whether obscenity was entitled to the same constitutional guarantees as other forms of expression was, until the decision in *Roth-Alberts*, an "open question". Lockhart and McClure, *Literature, The Law of Obscenity, and The Constitution*, 38 Minn. L. Rev. 295, 352 (1954). In *Roth-Alberts*, a majority of this Court answered the question in the negative. As against claims that obscenity is utterance within the area of protected speech and press, and that the requirements of due process are not met because of lack of precision when terms like "obscene, lewd, lascivious, filthy or indecent" are used to define the crime, a majority of this Court held that, given a proper standard for judging obscenity, constitutional safeguards for protected material were not offended.

What then is the proper standard for judging obscenity? A majority of this Court replied that sex is not obscenity; that the portrayal of sex, for example, in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. *Id.*, at 487. It was stated that all ideas having even the slightest

redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to "the prevailing climate of opinion"—have the full protection of the guarantees unless excludable because they encroach upon the limited are of more important interests. *Id.*, at 484. The door barring federal and state intrusion into the area of freedoms of speech and press was to "be kept tightly closed and opened only the slightest crack" (*id.*, at 488).

Affirmatively, this Court formulated a definition of obscenity allegedly no different in substance from the definition proposed by the American Law Institute. *Id.*, at 487, fn. 20. In determining the obscenity of a writing, "contemporary community standards" were to be applied. *Id.*, at 489. Without this element, "Roth's evident purpose to tighten obscenity standards" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487) would be frustrated. Thus, the obscenity or nonobscenity of a writing was made not to depend upon legal standards applicable to all other forms of expression, but to public opinion—and under such circumstances, trial by jury, it is submitted, is as indispensable to a decision on the issue of obscenity or nonobscenity of a writing as the standard itself of "contemporary community standards", deemed essential in *Roth-Alberts* to safeguard freedom of expression.

If "community toleration" is to remain the test, only a jury representing the community, can properly decide what the community does or does not tolerate. A jury, in accordance with "our basic concepts of a democratic society and a representative government" is required to be a "body truly representative of the community," a "cross-section of the community" serving

only "as instruments of public justice" and not as the "organ of a special class." *Glasser v. United States*, 315 U. S. 60, 85-86.

Unless, therefore, the fact of a jury trial is subsumed within the concept of "contemporary community standards", the test for obscenity formulated in *Roth-Alberts* as a safeguard for protected speech and press becomes, it is submitted, illusory. To enact a statute which permits books to be burned because they allegedly exceed the bounds of community toleration, without allowing the community through its representatives to decide whether the books exceed the limits of such community toleration, is arbitrary and capricious and violative of the due process and free speech and press provisions of the Constitution. This at least is the verdict of history, both past and present, and, it is submitted, the "commonsensical" interpretation of this Court's ruling in *Roth-Alberts*.

A judge is not a representative of the community; he is a representative of an arm of government, the judicial arm, and the jury, as Madison made clear, was intended to act as a barrier against "all forms and departments of Government" where the people's right to know was at stake in any dispute between the Government and individual citizens. A very strong tradition is opposed to the notion that a single judge should be able to suppress any book or periodical or work of art. 1 Government and Mass Communications (1947) 218.

Moreover, a judge does not in fact represent a cross-section of the community; he represents, at best, only his own group. "The division of the community into groups becomes less serious if several groups are represented on the jury. In the vague field of obscenity,

a single judge must struggle hard to avoid using only the standard of his own group." 1 Government and Mass Communications (1947) 220.

Nor is a judge likely to know the extent of community toleration. "Twelve men in the street are familiar with the amount of frankness that Tom, Dick and Harry will stand, more so than a judge, who is somewhat set apart from the regular run of people by the seclusion and intense preoccupations of his work. . . . A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read." *Id.*, at 221.

Finally, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14. However strongly it may be urged that a judge may be relied upon to fairly determine the issue of customary freedom of expression, history demonstrates that a free people will not be content to permit an official of government to decide for them what they may speak and read. Unless there is the appearance of fairness in decision making, as well as actual fairness in decision, there can be no confidence that we are a government of laws, not of men.[8]

(d) The court below rejected appellants' claimed right to a jury trial, because, stated the court, the Bill of Rights of the state and Federal Constitutions pre-

[8]In Massachusetts, any person interested on behalf of a book may appear in a suit seeking to suppress the writing as obscene, and claim a right to trial by jury on the issue of obscenity. General Laws, ch. 272, section 28D. Wisconsin has a similar provision. Statutes, section 269.565(2). See also, 19 U. S. C. 1305 (libel proceedings after seizure by Customs; party interested may demand jury trial).

served only the right of trial by jury "as it existed at common law" [R. 41]. "This action grows out of a statute", stated the court, "and we know of no basis for it at common law. Therefore, there was no right to a jury trial" [R. 41].

It is submitted that the ruling of the court below does not meet the issue here. The *in rem* proceeding was initiated here to destroy and burn *books*, ordinarily protected from suppression by the provisions of the First Amendment. The framers of the Bill of Rights did not intend to adopt "common law" concepts with respect to freedom of expression; these common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions". *Grosjean v. American Press Co. Inc.*, 297 U. S. 233, 249. See 1 Annals of Congress (1834) 436; Madison; *Report on the Virginia Resolutions*, 4 Elliot's Debates 546, 561-567.

Since the State's power to suppress obscenity is limited by the constitutional protections for free expression, and since, it is submitted, the requirement of a jury trial is integral to the "contemporary community standards" test for judging obscenity, it does not meet the issue to assimilate common law rules, or the non-existence of common law precedent, to a prosecution of books in the United States where history, tradition and a written constitution dictate a different resolution of the issue. Compare, *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrant*, 367 U. S. 717, 730-731.

The question is not whether the Seventh Amendment requires a jury trial in obscenity prosecutions,[9] but

[9] See, the dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 68-123.

whether the First Amendment, as subsumed into the due process provisions of the Fourteenth Amendment, does so require. As Madison stated: "The state of the press, therefore, under the common law cannot . . . be the standard of its freedom in the United States." *Report on the Virginia Resolutions* in 4 Elliot's Debates 546, 570.

(e) In the light of all the aforesaid, appellants submit that the absence in the statute herein of a right to jury trial renders the statute unconstitutional. Of course, as with jury questions generally, a trial judge must initially determine that there is a jury question, "i.e., that reasonable men may differ whether the material is obscene". Mr. Justice Brennan, dissenting in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448. But a court cannot instruct a jury that a given writing is obscene as a matter of law, "since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression". A.L.I. Model Penal Code, Tent. Draft No. 6 (May 6, 1957) 47. An appellate court may for similar reasons, reverse an obscenity judgment if a trial court fails to submit a controverted issue of community standards to a jury, but it may also reverse a jury determination if, in the opinion of the appellate court, reasonable men could not differ on the question of a writing being within the customary limits of candor. See, *Commonwealth v. Moniz*, 336 Mass. 178, 143 N. E. 2d 196 (1957); 338 Mass. 442, 155 N. E. 2d 762 (1959). And since the issue involves factual matters "entangled in a constitutional claim", the appellate courts, and ultimately this Court, may declare the material constitutionally protected despite the jury determination. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488.

II.

The Statute, on Its Face, and as Construed and Applied, Violates the Free Speech and Press Provisions, the Search and Seizure Provisions, and the Due Process Provisions of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

(a) The appellants consider, first, the validity of the statute, on its face and as construed by the state courts. "The interests here at stake are of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon, the particular parties here involved. Freedom and viable governments are both, for this purpose, indivisible concepts; whatever affects the rights of the parties here, affects all." *Gibson v. Florida Legislative Investigation Committee*, 372 U. S. 539, 545-546. See also, *Smith v. California*, 361 U. S. 147, 151; *Thornhill v. Alabama*, 310 U. S. 88, 97-98.

On its face, the Kansas statute interdicts any book "containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons" (G. S. 1961 Supp. 21-1102[a]).

The test to be applied in cases under the aforesaid section (a) is whether the effect of the book upon the average person in the community is to arouse "sexual desires" or "sexually improper thoughts". The book must be judged as a whole, "by the standards of common conscience of the community of the contemporary period of the violation charged". G. S. 1961 Supp. 21-1102(b).

Whenever a judge receives an information, verified "upon information and belief" by the county attorney or attorney general, stating that there is any prohibited book as set out in subsection (a) located within his county, it "shall be the duty of such judge" to "forthwith" issue his search warrant directing the seizure of such "prohibited item or items". A copy of such warrant shall be served or posted by the sheriff at the time of seizure of the material, which shall serve as notice to all interested persons of a hearing to be had "at a time not less than (10) days after such seizure". At the hearing, the judge issuing the warrant shall determine whether the material seized violates the statute. If the judge so finds, he shall order the items destroyed, provided such items shall not be destroyed so long as they may be needed in any criminal prosecution. G. S. 1961 Supp. 21-1102(c).

A standard which calls for the suppression of books deemed "immoral" or "manifestly tending to the corruption of morals of persons" fails to provide ascertainable standards and readily sweeps within its ambit constitutionally protected material. *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, rev'g. 177 Kan. 728, 282 P. 2d 412 (1955); *Musser v. Utah*, 333 U. S. 95, and the subsequent state decision, *State v. Musser*, 118 Utah 537, 233 P. 2d 193; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587, rev'g. 305 N. Y. 336, 113 N. E. 2d 502 (1953).

Moral standards are so ambivalent[10] and are so constantly being modified by a host of complex influences

[10]See, Kinsey. *Sexual Behavior in the Human Male* (1948); *Sexual Behavior in the Human Female* (1953).

that any attempt to measure constitutional protection for books by such a vagrant standard as "immoral" can only result in the suppression of some of the finest literature of our times. The Constitution protects ideas which are contrary to "the moral standards" of its citizenry; it indeed protects "advocacy of the opinion that adultery may sometimes be proper" (*Kingsley Pictures Corp. v. Regents, supra,* at 688-689). See also, *Mounce v. United States,* 355 U. S. 180, rev'g. 247 F. 2d 148 (9th Cir., 1957). Nor, for similar reasons, is the "corruption of the morals of persons" a proper standard for safeguarding the protection of freedoms of speech and press. ". . . the proposition, however stated, is fraught with ambiguities and an assumption of doubtful validity". Lockhart and McClure, *Literature, The Law of Obscenity, And The Constitution,* 38 Minn. L. Rev. 295, 332.

Moreover, and this appears crucial to the issue here, the *test* to be applied in the use of such aforesaid standards is solely the effect of arousing "sexual desires" or "sexually improper thoughts". This Court has refused to support a standard so vague and ambiguous as to permit the suppression of material because it allegedly arouses 'sexual desires." *Times Film Corp. v. City of Chicago,* 355 U. S. 35, rev'g. 244 F. 2d 432, 435 (7th Cir., 1957).

The American Law Institute stated: "We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." Tent. Draft. No. 6, *supra,*

at 10. Critical commentators are uniform in declaring that the "sexual desires" or "sexually improper thoughts" test for obscenity cannot be squared with the dictates of the First Amendment. See, for example, Lockhart and McClure, *Literature, The Law of Obscenity, And The Constitution,* 38 Minn. L. Rev. 295, 329-331; Kalven, *The Metaphysics of the Law of Obscenity,* The Supreme Court Review (1960) 1, 40-41; *United States v. Roth,* 237 F. 2d 796, 80 *et seq.* (2d Cir., 1956), dissenting opinion of Judge Frank; *Commonwealth v. Gordon,* 66 Pa. Dist. & Co. R. 101 (1949), opinion of Judge Curtis Bok. And it is entirely arbitrary and capricious to infer that a sexual desire has a corruptive effect upon the average person.

Since "standards of permissible statutory vagueness are strict in the area of free expression" (*N.A.A.C.P. v. Button,* 371 U. S. 415, 432), the statute here which is susceptible of sweeping and improper application should not be permitted to stand, it is respectfully submitted.

Nor was the construction of the statute by the courts below restrictive of the statutory language. The District Court declared that the rule of the *Roth* case, and the test set forth in the statute, would be made "operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution" [R. 39-40].

The opinion of the court below recites the District Court's decision with manifest approval [R. 38-40].

The Court then states that the "test for obscenity is not easy to state" [R. 40]; that Irvin Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 40]; that the books herein were rightfully suppressed "by the definition found in the Roth case, or by the definition found in the statute or by any other definitions" [R. 41].

Thus, the Court seemingly embraces all conceivable tests like talismanic labels. Compare, *Stromberg v. California*, 283 U. S. 359, 368. This much is clear from the Court's opinion: it recognizes that the *Roth* test is different from the test in the state statute. It was conceded that the state statutory test had been taken only "from an instruction" allegedly approved in *Roth*. See, 354 U. S., at 490. Thus, the statute, as construed, eliminates any "prurient interest" or "corrupt and deprave" test and substitutes solely the interdiction of books which arouse "sexual desires" or "sexually improper thoughts."

It is in this context, moreover, that the statute provides for the search and seizure of books and other publications as well as pictures, motion pictures and other representations. Here the proceedings under the statute may be initiated solely by an information verified "upon information and belief". Compare, *Rice v. Ames*, 180 U. S. 371, 374. No copies of the publications alleged to be "immoral" or manifestly tending to the "corruption of the morals" by arousing "sexual desires" and "sexually improper thoughts" are required to be submitted to the judicial officer before issuance of the warrant of seizure.

There is no provision for any adversary proceeding on the issue of unlawfulness of the material prior to

seizure. The statute effectively cuts off the circulation of the material and the public's access to the writings without any prior determination that the material is not entitled to constitutional protection. The judicial officer is under a mandatory duty to issue the warrant, forthwith, and a hearing can be held "not less than" ten days after seizure. There is no limitation on the time within which a decision must be made. The statute, by the breadth of its terms and the vagueness of its language, authorizes the issuance of general warrants against writings, and permits the arbitrary search for and seizure of all media of communication.

The statute, on its face and as construed, thus bristles with constitutional infirmities. Initially, the statute is so broad and so vague and ambiguous in its terminology that it suffers from the double vice of being "capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression" (*Smith v. California*, 361 U. S. 147, 151), and of failing to provide ascertainable standards so that men of common intelligence can determine what is or is not permissible (*N.A.A.C.P. v. Button*, 371 U. S. 415, 432-434). The statute broadly vests in public officials an unrestricted discretion to censor and suppress books. See, *Lovell v. Griffin*, 303 U. S. 444; *Thornhill v. Alabama*, 310 U. S. 88.

In addition, the statute creates a system of prior restraints of expression, limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70. None of the "closely defined procedural safeguards" found in the New York statute approved in *Kingsley Books, Inc. v.*

Brown, 354 U. S. 436, 437 appear in this Kansas statute.

Moreover, the statutory procedures here are permeated with even more constitutional infirmities than in *Marcus v. Search Warrant*, 367 U. S. 717. The Missouri statute, and implementing rules of court (367 U. S., at 719-720, fn. 2, 3, 4), require the complaint to be verified by oath or affirmation and to state the "facts positively and not upon information or belief". The judicial officer must be satisfied that there is "reasonable ground" for the complaint, and the warrant need not issue until the judge or magistrate is satisfied from the "evidential facts" of the "existence of probable cause".

Here under the Kansas statute the information may be verified "upon information and belief", and without more, the judicial officer is under a duty to issue the warrant of seizure. There is no step in the Kansas procedure before seizure "designed to focus searchingly on the question of obscenity". *Marcus v. Search Warrant, supra*, at 732.

Indeed, the statute permits the filing of an information so sparse that no warrant could properly issue thereon consistent with the requirement of the Fourth and Fourteenth Amendments. Compare, *Wong Sun v. United States*, 371 U. S. 471, 481-482. The statute permits the issuance of wholesale or dragnet search warrants against writings which both the First and Fourth Amendments, subsumed into the due process provision of the Fourteenth Amendment, forbid. *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Near v. Minnesota*, 238 U. S. 697; *Mapp v. Ohio*, 367 U. S. 643.

(b) The statute, as applied to the books herein involved, also violates the constitutional provisions aforestated. It should be noted that only seven books were presented to the District Judge. The prosecutor, by notations, guided the Judge to the reading of excerpts in the books. Thus, the *Hicklin* method of judging the obscenity of writings was employed, despite the rejection of such method by this Court in *Alberts* "as unconstitutionally restrictive of the freedoms of speech and press". 354 U. S. 476, 489.

The District Judge refrained from stating that he had read the books in their entirety; he had only "scrutinized" them. The record shows that only about ¾ of an hour was consumed in such "scrutiny". Thus, as to the seven books, there was no attempt made, nor was there time, to determine the "dominant theme" of each of the books, "taken as a whole". See, *People v. Bantam Books* (*People v. Carr*), 9 Misc. 2d 1064, 172 N. Y. S. 2d 515 (1958).

The determination to issue the warrant was based upon the said scrutiny of the seven books, upon which basis the District Judge concluded that "any" publication bearing the imprint "This is an original Night Stand Book" *would* violate the statute. The warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint aforestated.

Pursuant to such warrant, the executing officer did in fact seize and remove 1,715 books, of which there was 31 different and specific titles. The warrant of seizure, issued on July 25, 1961 and executed on July 26, 1961, gave notice of a hearing to be held on August 7, 1961.

The motion to quash was filed on the said day, and decision denying the motion was rendered on August 11, 1961. While it is true that appellants were compelled to seek a continuance of the hearing thereafter on the merits in order to properly prepare their defenses against such wholesale seizure, it appears clear, it is submitted, that there was in this case a "thoroughgoing and drastic restraint" on the circulation of books. *Marcus v. Search Warrants of Property*, 367 U. S. 717. See also, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 518-519; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. Moreover, no jury determination was ever made that the books exceeded community standards, and the writings are still suppressed.

The statute, as thus construed, and as applied to the particular factual situation under consideration, constitutes an effective prior restraint on First Amendment freedoms. Here, Kansas has empowered its courts to suppress the dissemination of unexamined books issued by a publisher solely because other books issued by the publisher had been deemed offensive. "This is of the essence of censorship." *Near v. Minnesota*, 283 U. S. 697, 713; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 445. See also, *Grosjean v. American Press Co.*, 297 U. S. 233. To seize books under circumstances such as these, and suppress their circulation, is to create a judicial "instrument for stifling liberty of expression" (*Marcus v. Search Warrant, supra*, at 729) which the Bill of Rights was intended to outlaw.

III.

The Adoption by the Courts Below of the Geographical Area of Junction City, Kansas, as the Community by Which to Determine the Claims of Constitutional Protection for the Books Herein Involved Renders the Statute, as Thus Construed, Unconstitutional in Violation of the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

The First Amendment does not permit, it is submitted, the suppression of books merely because they may be deemed offensive by a local community. "The Constitution is not geared to patchwork geography. It tolerates no independent enclaves." *Christian v. Jemison*, 303 F. 2d 52, 55 (5th Cir., 1962).

The standards for judging obscenity formulated by this Court were clearly intended, it is submitted, to restrict the opportunities for supression of writings in the United States. The Court has constantly held that the protections of the First Amendment are equally provided with the same force and effect in the Fourteenth Amendment. *Marsh v. Alabama*, 326 U. S. 501, 511; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684. ". . . rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered down versions of what the Bill of Rights guarantees." *Gideon v. Wainwright*, 372 U. S. 335, 346. If these protections are to be safeguarded, it would appear essential that there be a national standard for the judging of obscenity. If the Nation as a whole tolerates a writing, thus affording the writing First Amendment protection, it cannot be the right of a local community, it is submitted, to burn

the book as "obscene". The power of a local community to deal with "obscenity" is not curtailed in legal concept by a constitutional requirement that the trier of the facts measure the protection to which the book is entitled by the standards of the national community. The police power of a State or any local subdivision thereof is always limited, in any area, by the free speech and press, due process, and equal protection provisions of the Fourteenth Amendment. *Talley v. California,* 362 U. S. 60; *Chambers v. Florida,* 309 U. S. 227; *Baker v. Carr,* 369 U. S. 186.

Professors Lockhart and McClure have expressed the view that only a national standard for judging the obscenity of a writing is compatible with First Amendment requirements; that the "standards of particular state and local communities are not constitutionally applicable". (*Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 1, 112 [1960]). This view is predicated upon the premises, in summary, that adoption of local standards leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon books and art and other media of communication; that such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; that the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; that such narrow construction results in the citizens of one part of the country enjoying the right to read literature denied capriciously

to citizens of another part of the country; and that the use of "local standards" subverts the function of appellate courts, required to apply First Amendment standards, by intruding conflicting standards imposed by a local community. 45 Minn. L. Rev. at 108-114.

Could a local jury applying "local standards" find a bookseller guilty of selling a book which this Court had held to be constitutionally protected under the First Amendment? The answer, it is submitted, must be clearly in the negative. It is no interference with the State's power to enforce obscenity laws to hold that the trier of the facts must apply national standards. What is inherently involved in any obscenity prosecution is whether the writing is entitled to First Amendment protection. First Amendment protection means the protection which the Constitution of the "United States" provides; the protection is national in scope. Moreover, it is protection for freedom of the mind and spirit; not the sale of pots and pans to the local householder. *Cf., Smith v. California*, 361 U. S. 147, 152-153.

A local jury which authorizes the suppression of a book that the people of the country would not authorize "invades the sphere of the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642. The reason why *no* State can compel a flag salute today is because the national standard of freedom of expression embodied in the First Amendment forbids it. The standard for destroying a book should be no less. See, *Talley v. California*, 362 U. S. 60, 64-65.

There is, of course, a two-fold requirement of proof with respect to "community standards" in obscenity prosecutions, if First Amendment guarantees are to be assured. First, the proof should show that the writing goes beyond the standards of the local community. Clearly, if the writing does not, that is the end of the matter. And of course, a local community may always permit a broader area of freedom of expression than even the First Amendment assumedly protects. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 679 (1959). Secondly, the proof should show that the writing exceeds the contemporary standards of the country generally. Without such additional proof, the constitutional protection for writings which are not obscene is abridged.

There is precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides. . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon such conduct." *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E. D. Pa., 1957), opinion by Chief Judge Ganey. See also, *In re Naturalization of Spak*, 164 F. Supp. 257, 259-260 (E. D. Pa., 1958).

Such a two-fold requirement safeguards personal and societal interests protected by the Bill of Rights. A lesser requirement creates "intolerable consequences" and encounters, it is submitted, "constitutional barriers." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487, 488.

IV.

The Statute, as Construed and Applied, Permits the Suppression of Books Without Any Requirement of Proof by the State That the Writings Exceed Contemporary Community Standards, and Despite Uncontradicted Evidence Offered by Appellants, Arbitrarily Disregarded by the Courts Below, That the Said Books Do Not Go Beyond the Limits of Candor in Description or Representation of Sex, All in Violation of the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

(a) Not only did the State fail to offer any proof that the books herein involved go substantially beyond the limits of candor in description or representation of sex, but the record makes abundantly clear that such proof was purposefully omitted as not constitutionally required. According to the State, in order to prove "community standards", it would be necessary to produce an indefinite number of witnesses from which to distill the viewpoint of the "average man" in Junction City [Tr. B-17]. This, the State averred, is an impossibility. But, affirmed the State, the *District Judge*, a resident of the community, could determine in his own mind "what is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21]. All of this was proper, asserted the State, because the

issue of community standards "is a matter of law [Tr. B-18].

As heretofore demonstrated, the issue of contemporary community standards involves factual matters entangled in a constitutional claim. A single Judge is not the "average man" in a community, nor does he represent "community standards", nor, it is submitted, can a State constitutionally create a single Judge as the embodiment of community standards. Such exercise of State power is both arbitrary and capricious. See Chafee, Government and Mass Communications, Vol. 1 (1947), 218-221.

The argument of the State here that proof is impossible to adduce on the issue of community standards is without substance, first, because it is based on the erroneous view that community standards is solely a question of law, and second, because there are means available to prove community standards without gathering all the "average" men in the community as witnesses. See, *Smith v. California*, 361 U. S. 147, 164-167, 171-172; *In re Harris*, 56 Cal. 2d 879, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961).

This omission of proof creates a serious constitutional infirmity in the law because evidence that a writing goes beyond customary limits of candor is an essential element of the test for obscenity; because the ingredient of "community standards" was made a part of the test "to tighten obscenity standards"; and because without such evidence, liberty and property, as in the case herein, can be lost without due process of law, and freedoms of speech and press abridged. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 482-488; *Thompson v. City of Louisville*, 362 U. S. 199;

Schware v. Board of Bar Examiners, 353 U. S. 232; *Garner v. Louisiana*, 368 U. S. 157.

(b) While the State made no attempt to prove that the books herein go beyond contemporary community standards, the appellants, without rebuttal on the part of the State [Tr. B-136], proved that the books do not exceed the community limits of candor in description or representation of sex. This was done through expert testimony, and by the introduction into evidence of comparable books openly appearing in the public libraries, and sold and purchased in the community, and receiving wide general acceptance. If it is a denial of due process of law to make a finding of statutory violation without evidentiary support, it would appear to compound the constitutional infirmity to make a finding of "obscenity" when the only uncontradicted evidence in the record shows that the statute is not violated. See, *Garner v. Louisiana*, 368 U. S. 157.

Moreover, the evidence of wide acceptance of comparable material offered by appellants was arbitrarily disregarded by the District Court, upheld by the court below, upon invalid grounds. The District Court held [R. 11-12] that the difference between the books in question and the comparable material offered into evidence by appellants was their "purpose", to wit, that "sex" was "subservient" to the plot in the comparable writings, while in the books in question, the plot was subservient to sex.

Clearly, if the books in question did not go beyond the customary freedom of expression found in other writings tolerated in the community, then the books in question could not be held to exceed contemporary community standards. Whether sex was subservient to

the plot of a book, or a plot subservient to sex, was not the issue. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith v. California,* 361 U. S., at 171.

The result of the action of the courts below is this: first, there is no finding in the record that the books herein exceed community standards (nor any evidence to support such a finding); and second, the appellants were essentially deprived of the right to present relevant evidence in defense of the books. In both respects, the due process provisions of the Fourteenth Amendment were violated. *Thompson v. City of Louisville,* 362 U. S. 199; *Smith v. California,* 361 U. S. 147, 164-166, 171-172; *In re Harris,* 56 Cal. 2d 836, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961). The books herein face destruction solely because of a ruling that the books allegedly incite "sexual desires". See, *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 486.

V.

The Statute, as Construed and Applied to Permit the Destruction of the Books Herein as Obscene, Violates the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

(a) In the constitutional sense, the books here in issue cannot be held to go substantially beyond limits of candor in description and representation of sex and nudity. They clearly do not go beyond customary limits of expression in language or theme—indeed, they are far more muted—than many of the "best-sellers" in the literary world and in other media of communication, such as the motion pictures, television and the arts.

Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language, that is found in writings of noted authors generally accepted and widely read by the public.

The aforesaid is demonstrated, it is submitted, by comparing the books herein with such works as Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 26], where the descriptions of sexual activity are candid and the language used, explicit; Wilson, *Memoirs of Hecate County* [Deft. Ex. 2, R. 26], the stories of residents of a suburban community with detailed descriptions of sexual intercourse; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 26], detailed description and representation of sexual activities; O'Hara, *From the Terrace* [Deft. Ex. 5, R. 26], explicit sexual scenes and language throughout the story; Metalious, *Peyton Place* [Deft. Ex. 6, R. 26], replete with realistic language and incidents involving rape, incest, sexual deviations, nymphomania and other sexual aberrations; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 26], depicting in detail the sexual activities, martial and extra-marital, of a middle-aged Pennsylvania lawyer; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 26], a realistic story of army life in Hawaii; Merger.dahl, *The Bramble Bush* [Deft. Ex. 11, R. 26], a detailed account of murder, adultery and seduction in a small New England town; Nabakov, *Lolita* [Deft. Ex. 19, R. 27], the tale of a continuous seduction of or by a twelve-year old girl by or with a middle-aged lover; Mykle, *Song of the Red Ruby* [Deft. Ex. 29, R. 27], graphic and explicit sexual descriptions throughout the writing. These books, and many others, it should be recalled, were all in the public library of Junction City [R. 25-28].

Measured by the standards of customary freedom of expression in the country today, the books herein are clearly not obscene, it is submitted. Each of the books involved contains a plot or theme [R. 29, 31, 32]. Many of them point on obvious moral [R. 29, 31]. None of the four-letter words used in the vernacular in so many best-sellers today, and owned by the library in Junction City, appear in the books here sought to be suppressed [R. 29]. The descriptions of sexual behavior in these books do not go beyond the candor of description of sexual activities found in the best-sellers contained in the Junction City library [R. 32], which are widely read, accepted and tolerated by the community generally [R. 28, 29, 30, 33]. "Today any part of life is considered fit for literary composition and publication" [R. 33].

The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button*, 371 U. S. 415, 445. Unless integrated with unlawful conduct, all ideas—"unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—have the full protection of the guaranties of the First Amendment. *Alberts v. California*, 354 U. S. 476, 484.

Thus, this Court has held that it would be a complete repudiation of the philosophy of the Bill of Rights for a State to suppress "the dissemination of views because they are unpopular, annoying or distasteful". *Murdock v. Pennsylvania*, 319 U. S. 105, 116. The Court has stated: "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous en-

lightenment was ever to triumph over slothful ignorance." *Martin v. Struthers,* 319 U. S. 141, 143. The essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut,* 310 U. S. 296, 310. The "very basis of a free society" is the right of expression "beyond the conventions of the day." Mr. Justice Frankfurter, concurring in *Hannegan v. Esquire,* 327 U. S. 146, 160.

The First Amendment protects literature and the arts because they serve as vehicles for the exposition of ideas, because they "lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created". Meikeljohn. *The First Amendment Is an Absolute,* Supreme Court Review, 245, 257, 262-263 (1961). See, *Alberts v. California,* 354 U. S. 476, 484, 487-488; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 368-373 (1954). See also, 5 Social Meaning of Legal Concepts, 34, 36 (1953); Trilling, *The Meaning of a Literary Idea, Aesthetics Today,* 213 (Philipson ed. 1961); Wilson, Axel's Castle, 2 (1931).

Freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society will be permitted to find "his own proper diet." Barzun, *The Arts, The Snobs and the Democrat;* Aesthetics Today, 19 (Philipson ed. 1961). Books contain ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of or insight into the human condition. "From the multitude of competing offerings the public

will pick and choose". *Hannegan v. Esquire*, 327 U. S. 146, 158.

The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be freed from "irrational fears". Mr. Justice Brandies in *Whitney v. California*, 274 U. S. 357, 376. "To put the issue as simply as possible: we maintain freedom not in order to indulge error but in order to discover truth, and we know no other way of discovering truth." Commager, *Free Enterprise In Ideas*, The First Freedom, 233 (Am. Library Ass'n, Downs ed. 1960).

This Court has stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority". *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689. "Men are entitled to speak as they please on matters vital to them; . . . Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood v. Georgia*, 370 U. S. 375, 389. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641-642. History has amply proved the virtue of "minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our so-

ciety". *Sweezy v. New Hampshire*, 354 U. S. 234, 251. See also, Milton, Areopagitica 389-391, 397-399 (Great Books ed.); Madison, *Report on the Virginia Resolutions* in Elliott's Debates 569-571 (1907 ed.); Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson, 438-441 (Fed. ed.); Chafee, *Free Speech in the United States* 33 (1941); Commager, *Freedom Loyalty Dissent* 14-15 (1954).

The court below described the books as "trash" and without "literary merit" [R. 41]. Neither of these appellations, it is submitted, are appropriate standards for denying constitutional protection to the writings. Sex is not obscenity (*Alberts v. California*, 354 U. S. 476) and the label of "hard core pornography" cannot be attached to writings which society generally tolerates. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489-490. ". . . a State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P. v. Button*, 371 U. S. 415, 429.

This Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York*, 337 U. S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste," or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hanne-*

gan v. Esquire, 327 U. S. 146. A communication is entitled to constitutional protection even if public officials deem it "sacriligious". *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; or "prejudicial to the best interests of the people". *Gelling v. Texas*, 343 U. S. 960; or "immoral", "harmful", "non-educational" and "non-amusing". *Superior Films, Inc. v. Dept. of Education (Commercial Pictures Corp. v. Regents)*, 346 U. S. 587; or "obscene, indecent and immoral", *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; or offensive to a "sense of propriety, morality and decency". *Mounce v. United States*, 355 U. S. 180; or because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry". *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; or because it arouses "sexual desires". *Times Film Corp. v. City of Chicago*, 355 U. S. 35; or because it advocates and depicts nudism and nudity. *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; or allegedly promotes "lesbianism" and "homosexuality". *One, Inc. v. Olesen*, 355 U. S. 371.

The standards employed by the courts below to authorize the burning of the books herein does not leave much "breathing space" for First Amendment freedoms to survive, it is submitted. *N.A.A.C.P. v. Button*, 371 U. S. 415, 433. Such standards permit subjective prejudices of fact finders and decision makers to intrude into the protected areas, and such standards encourage the baneful activities of self-interested and private censorial groups in local communities. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev.

5, 6-9 (1960); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Times Films Corp. v. City of Chicago*, 365 U. S. 43, 69-73; *Edwards v. South Carolina*, 372 U. S. 229, 237-238. ". . . constitutional rights may not be denied simply because of hostility to their assertion or exercise.", *Watson v. City of Memphis, Tenn.*, 373 U. S. 526, 535-536.

(b) Since the Court has ordered that the case of *Jacobellis v. Ohio*, argued last term (No. 164), be restored for reargument this term together with the case herein, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for appellants, with due deference, believe that this Court will welcome some brief discussion on the need for re-examination of the "developing constitutional standards" (Lockhart and McClure, 45 Minn. L. Rev. 5 [1960]) as enunciated in *Roth* and in the subsequent decisions. "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U. S. 649, 665.

The basic assumptions in *Alberts* upon which the majority opinion rested were that freedom of expression under the First Amendment is not absolute; that there appeared to be a universal judgment as expressed in international agreements and the laws of Congress and the States that "obscenity" should be restrained; that obscenity is "utterly without redeeming social importance"; and that "obscene" material is therefore not within the area of constitutionally protected speech or press.

It is respectfully submitted that the aforesaid assumptions require critical re-examination. Their statement in *Alberts* perhaps served as an introduction to the real problems, but they have been unfortunately treated by the lower courts, the censors and extra-legal censors, as determinative of all First Amendment issues.

It is unnecessary, it is submitted, to canvas the merits of the "absolute" and "balancing" arguments. See *Barenblatt v. United States*, 360 U. S. 109; Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). It may be conceded for purposes of argument that freedom of expression is not absolute, as for example when speech is integrated with unlawful conduct. But the problem is of drawing the line between the exercise of freedom and the limitations thereon. How shall the line be drawn? It is submitted that such question is not answered, as many courts and "citizens committees" appear to believe, by advancing the assertion that freedom is not "absolute".[11]

The other initial assumptions in *Alberts* suffer, it is submitted, from a specific difficulty—they assume common agreement on a definition of "obscenity" when as a matter of fact there is none. As Lockhart and McClure point out, there never has been an international agreement on the definition of obscenity. *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 323 (1954). A "universal

[11] "That liberty is not absolute is one of those truisms that is always brought out and put to work whenever somebody wants to censor a book or a film that he doesn't like, or to throw a teacher or a librarian or a radio performer out of his job." Commager, *Free Enterprise in Ideas*, The First Amendment 231 (Am. Library Ass'n. 1960).

judgment" that expression should be restrained without agreement as to what the area of expression, so to be limited, is, can hardly be deemed a weighty reason for restrictions on freedom of expression in the United States. This appears especially true when it is considered that many countries are concerned with "obscenity" only as it connotes attacks on state religions. Moreover, the history of federal and state legislation shows that these laws derive either from the comstockery of the nineteenth century or from laws principally concerned with blasphemy or other "impious libels". See Judge Frank's opinion in *United States v. Roth*, 237 F. 2d 796, 806-810; Kalven, *The Metaphysics of the Law of Obscenity*, Supreme Court Review 9 (1960). To place reliance upon the views of foreign countries, many without written constitutions, and upon laws in this country based on premises no longer acceptable under the Constitution and the First Amendment, as interpreted by this Court, appears, it is submitted, unsubstantial.

The notion that an utterance deemed "utterly without social importance" is *ipso facto* deprived of constitutional protection, deserves the most critical examination because of the serious First Amendment implications involved. There does not appear to be any area of protected speech except discussion of sex which is chained with such an ambiguous concept. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these

liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too illusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U. S. 507, 510. An utterance calling for equality of treatment without regard to race may appear utterly without social importance to a southern community, but its protection under the First Amendment cannot be doubted. *Edwards v. South Carolina*, 372 U. S. 229.

It cannot be the rule, it is submitted, that a book in the United States can be suppressed if the "average person" in the community believes it to be without social value. "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that is of social importance to them." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, at 114. The man who suggested that if all mankind "minus one" were of one opinion, mankind would have no right to silence that opinion, also stated:

> "Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the

whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exagerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. . . . Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, *ought to be considered precious,* with whatever amount of error and confusion that truth may be blended."

John Stuart Mill, On Liberty 31 (McCallum ed. 1946) (emphasis supplied).

The standards for judging obscenity which the Court has enunciated do not appear to safeguard the freedoms of speech and press protected from all governmental infringement under the Constitution.[12] One ingredient, to wit, that the dominant theme of the material taken as a whole "appeals to prurient interest" has been the source of considerable confusion and the basis for unjustified invasions of freedom of expression. The difficulty lies principally in the meaning of

[12]Our discussion here is concerned with the right of the average, normal adult to read a book dealing with sex. We believe a different category of constitutional problems are presented when a narrowly drawn statute specifically limited to the distribution of writings to children is involved.

the words "prurient interest". Very few persons, including psychologists, appear to know what these words mean. In *Alberts,* this Court noted that pruriency has been defined as "quality of being prurient; lascivious desire or thought." The American Law Institute has defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."

None of these definitions have proved to be workable. See, *State v. Nelson,* 1680 Neb. 394, 95 N. W. 2d 678 (1959); *State v. Jackson,* 224 Ore. 337, 365-379, 356 P. 2d 495, 508-515 (dissenting opinion by Justice O'Connell). They are tautological, subjective and imprecise. They serve only to feed the prejudice of the trier of the facts and enable courts and juries to suppress writings on no other basis than the talismanic labels. If anything can be distilled from the aforesaid terms, it is that writings which cause sexual desires or sexual thoughts may be suppressed. If this be the intendment of the "prurient interest" standard, then at least two difficulties are presented: the first, that in no other area of speech and press has it ever been accepted by this Court that utterances may be interdicted because they arouse thoughts and desires; second, if books are to be suppressed because they may arouse a sexual desire or a sexual thought, it is much to be feared that a great many libraries will be deprived of most of their contents, including the recent library assembled for the White House by a distinguished group of scholars. See, *N. Y. Times,* August 16, 1963, p. 1, col. 5.

Mr. Justice Harlan, in *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, suggested that the unseemliness of utterances could not be deemed obscene unless, in addi-

tion, the utterances were shown to have a "likely corruptive effect." (*Id.*, at 484-487). While such view may appear at first glance to tighten the definition, it must be stated with deference that the "corruptive effect" concept is also far from a satisfactory solution of the constitutional problem. Aside from the complex question involved in determining whether an average normal adult with his or her particular background can ever be "corrupted" solely by the reading of a book to the point of becoming changed in character and outlook, there remains the problem of whether or not writings can be suppressed under the First Amendment solely because some judge or jury may believe that a reading of the work will eventually cause the average normal adult to begin to change from Dr. Jekyll to Mr. Hyde.

With respect to the ingredient, "contemporary community standards", and "the common conscience of the community", we find here again the difficulty of determining what national standards are or what is meant by "common conscience of the community", and also the constitutional objection that the writing of a dissenting voice should not be suppressed because the community does not like it. Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Mr. Justice Jackson also stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be ortho-

dox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Id.*, at 642).

It also appears plain today that the standards for the protection of freedom of expression under the First and Fourteenth Amendments will not be safeguarded by resort to the "hard core pornography" test. While this phrase may have evoked a particular image of restricted material in the mind of the Solicitor General, who briefed the argument in *Alberts*, it appears clear that the same image does not exist in the minds of many lower courts, and in those censorial groups who now patrol all outlets engaged in the circulation of the press. The "hard core pornography" test has become, as the opinion of the court below reveals, nothing more than a vehicle for suppressing freedom of expression.

It is respectfully submitted that no "compelling interest" has been advanced to justify the treatment of writings dealing with sex as *sui generis* and outside the pale of constitutional protection. Insofar as such writings oppose the moral or ethical standards of the day, they would appear to have the same right to protection as any other writing which attacks accepted conventions. Insofar as such writings create sexual thoughts or sexual desires, they deserve protection nevertheless just as much as writings which arouse political, economic, social or other related desires and thoughts. There does not appear to be any reason why books dealing with sex should not have the same rights and the same limitations as are accorded all other expression under the Constitution of the United States and

the decisions of this Court. There are ample laws available and ample power available for the State to deal with sexual misconduct without invading the area of protected expression. To enforce the provisions of the Constitution is not to weaken the power of the federal government or the power of the States. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Appellants.

Of Counsel:
SAM ROSENWEIN,
C. L. HOOVER,
ROBERT A. SCHERMERHORN.

APPENDIX.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The provisions of the general statutes of Kansas (G. S. 1961 Supp., §21-1102; L. 1961, ch. 186, §1; June 30) are:

> "(a) Any person who shall import, print, publish, sell, design, prepare, loan, give away or distribute any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious

prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five (5) nor more than three hundred dollars ($300), or be imprisoned not to exceed thirty (30) days, or both.

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

5. The provisions of the general statutes of Kansas (G. S. 1961 Supp. §21-1102(c); L. 1961, ch. 186, §4; June 30) are:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21-1102] (a) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the

provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however*, Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."